

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION : Case No. 1:17-md-2804
: Cleveland, Ohio
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FINAL PRETRIAL PROCEEDINGS : *Tuesday, October 15, 2019*
: *12:34 p.m.*
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TRANSCRIPT OF FINAL PRETRIAL PROCEEDINGS

BEFORE THE HONORABLE DAN AARON POLSTER

UNITED STATES DISTRICT JUDGE

15 SPECIALMASTER DAVID R. GOVINDARAJ

Court Reporter: Donnalee Cotone, RMR, CRR, CRC
United States District Court
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1 AFTERNOON SESSION, TUESDAY, OCTOBER 15, 2019

2 (Proceedings commenced at 12:34 p.m.)

3 - - -

4 DEPUTY CLERK: All rise.

12:39:53 5 THE COURT: All right. Good afternoon.

6 Please be seated.

7 All right. Well, we're here for the final pretrial in
8 the opioid MDL, first bellwether trial, Summit County,
9 Cuyahoga County, against various defendants.

12:40:16 10 So the lawyers, parties, are here. We have a number
11 of matters I wanted to cover.

12 All right. We're set to begin jury selection
13 tomorrow. We'll have 50, the first 50 jurors brought in.
14 The jury department will pick them at random from the
15 roughly 150 people that we have left.

16 The Court and the parties will know this afternoon
17 which 50, and then the order will be determined randomly
18 tomorrow morning, and we'll -- that will be the order.

19 If we question jurors privately in chambers, we'll
20 just have one lawyer for each of the two plaintiffs and one
21 lawyer for each of the defendants. There will be no
22 parties, no consultants, just -- I don't want to overwhelm
23 the jurors.

24 There were many motions in limine filed, and I'm going
12:41:57 25 to summarize my rulings now.

1 I'll try to be efficient, and I will say at the outset
2 that my main job in this trial, once we pick a fair and
3 impartial jury, is to have the same strike zone for each
4 side. Probably no one is going to like my strike zone, but
12:42:23 5 I worked very hard to have the same strike zone for each
6 side. And I will say at the outset, I'm going to have a
7 very wide strike zone when it comes to the parties
8 introducing evidence about what the federal government, DEA,
9 FDA, did or did not do. That's an essential part of the
12:42:49 10 story, the narrative.

11 The facts are the facts. Each side is going to use
12 those facts in their narrative for the jury and for public
13 consumption, and I'm going to let both sides have a great
14 deal of latitude on that. We're obviously not going to have
12:43:09 15 witnesses purporting to tell the jury what the law is, but
16 in terms of what the DEA and FDA did or didn't do, and what
17 implications that would have, I'm going to let both sides
18 have at it.

19 All right. I'm going to start with a series of
12:43:34 20 motions filed by defendant Henry Schein.

21 Schein's number 1, pleading 2645, is denied. But it
22 is important that if the plaintiffs or witnesses use the
23 term defendants, if they don't mean it to mean all of the
24 defendants in this case, they've got to be specific, because
12:44:10 25 it isn't fair just to lump everyone together. That isn't

1 fair, and it's going to be confusing.

2 So the witnesses and the lawyers need to be careful
3 about that. If they do mean all of the defendants in this
4 case, fine; but if it's less than all, then they need to be
12:44:28 5 specific.

6 Schein number 2 is also denied.

7 Schein number 3 is denied without prejudice, but the
8 Schein defendants may object to any specific evidence or
9 argument that they feel is factually inaccurate and/or lacks
12:44:56 10 foundation.

11 Schein number 4 is denied. That relates to
12 medications distributed by Schein to Dr. Brian Heim. That
13 evidence can come in.

14 Schein number 5 is denied, reference's to Dr. Heim's
12:45:19 15 indictment.

16 Schein number 6, references to Dr. Harper, is also
17 denied.

18 Schein number 7 is denied.

19 Schein number 8 is also denied. It may be relevant.
12:45:40 20 Evidence about drugs distributed outside of Summit County
21 may also be denied.

22 Schein 9 is also denied. It references the DEA fines,
23 investigations, or admonitions. It's denied without
24 prejudice. If defendant Schein thinks that something is
12:45:59 25 relevant or extremely prejudicial, they can raise that

1 again.

2 Schein number 10 references the cease and desist
3 letter, is also denied.

4 And Schein number 11 is denied as to statute of
12:46:23 5 limitations.

6 And Schein number 12 is denied, references to Henry
7 Schein Animal Health.

8 All right, turning to Walgreens motions in limine.

9 Number 1, evidence or argument about Walgreens'
12:46:49 10 ownership interest in AmerisourceBergen is denied.

11 Number two, evidence relating to Florida DEA
12 enforcement action and related settlement, that's denied.

13 That goes with my general comments.

14 Number 3, references to DEA witness Joseph Rannazzisi
12:47:13 15 as the 60-Minute man. I'm going to allow brief accurate
16 references to the fact that Mr. Rannazzisi, who was a former
17 DEA deputy administrator, did appear on *60 Minutes* and other
18 news reports because that happened, but the plaintiffs can't
19 overemphasize or dwell on these facts, and they're not to
20 refer to him at all as the 60-Minute man unless that's a
21 nickname that -- in fact, I don't think -- I'm not going to
22 allow that at all. It's not relevant that someone may have
23 called him the 60-Minute man, so he'll just be Mr.
24 Rannazzisi. And if he appeared on *60 Minutes*, quite
12:48:02 25 frankly, either side can raise that, and the defendants may

1 use it to impeach him.

2 All right. Plaintiffs' omnibus motion *in limine*. I'm
3 going to grant the motion. There's not going to
4 be -- number one, there's not going to be any evidence or
12:48:24 5 testimony about attorneys' fee arrangements or how
6 litigation expenses are paid, or anything about that. That
7 is not relevant.

8 Number two, the plaintiffs have withdrawn their motion
9 to preclude testimony as to when parties selected, hired, or
12:48:49 10 were considering hiring attorneys. I will grant the second
11 part of the motion, any testimony as to the actual
12 arrangements or details of how attorneys are being paid or
13 how they're being retained; but when a Summit County or
14 Cuyahoga official retained or considered retaining an
12:49:22 15 attorney may be relevant.

16 Number three is denied as moot. The parties have
17 worked that out, as with number four.

18 Number five, I'm granting in part. There will not be
19 any reference to how attorneys for either side are being
12:49:51 20 paid, how much they're being paid, how they travel. It is
21 always admissible to ask an expert witness how much he or
22 she is being paid directly or indirectly. Any form of
23 compensation is fair game.

24 And a mode of transportation, if one is, you know,
12:50:14 25 flying lavishly to or from court or around, and where

1 they're getting the money to do that, parties can probe
2 that. So it's fair game for witnesses, expert witnesses,
3 it's not for attorneys.

4 Number six, reference to defendants' philanthropy or
12:50:38 5 good deeds. Plaintiffs' motion is overbroad because it
6 would preclude the defendants from saying anything about
7 themselves.

8 So defendants are allowed to introduce themselves,
9 describe accurately what they do, but evidence that parties
12:51:04 10 and/or their employees are good citizens, do good deeds in
11 the community, such as providing scholarships, community
12 service, that's not relevant for the corporation or for any
13 individual. That has nothing to do with this case, unless
14 somehow someone feels that something specific that an
12:51:25 15 employee is doing is relevant; but as a general rule, it's
16 not, so that part is granted.

17 Number seven, reference to any alleged malpractice
18 claims involving the parties' designated experts. I can't
19 decide this in the abstract, so it may be relevant as to a
12:51:44 20 particular witness. We'll have to deal with it as it comes.

21 Number eight, it's granted in part. The
22 defendants -- well, I mean, I think it actually is fair game
23 to call or refer or use expert reports of the other side if
24 they were noticed in the litigation but not called, so I'm
12:52:15 25 not sure what this refers to. If they weren't noticed,

1 neither side can refer to the other sides' experts that
2 weren't noticed; but if they were noticed and then a side
3 decides not to call them, the other side is free to use
4 them.

12:52:39 5 But if the witness isn't being called or the report is
6 not being used by either side, the fact that there might be
7 a malpractice claim against the witness is irrelevant. So
8 you can't just generally say, well, the plaintiffs had on
9 their list someone, and so-and-so has a malpractice claim,
12:53:00 10 because if the person is not testifying, it's irrelevant.

11 All right. Number nine is denied without prejudice.
12 People can use, you know -- can use technology to present
13 their testimony or documents.

14 Number ten was resolved. It's moot, the parties
12:53:23 15 worked that out.

16 Obviously, number 11 is granted. The reference to
17 what motions *in limine* the parties filed or didn't file or
18 the Court's ruling is not relevant to anything.

19 Number 12, related to punitive damages, is resolved as
12:53:43 20 moot because the plaintiffs aren't seeking punitive damages,
21 so there obviously won't be any reference to them.

22 Number 13 is granted. Defendants may not argue or
23 suggest that the Controlled Substances Act and its
24 implementing regulations have not always imposed the duties
12:54:08 25 that the Court has already determined, but this ruling does

1 not prevent any defendant from presenting evidence that
2 DEA's guidance has been inconsistent and/or shifted over
3 time, or to produce direct evidence of communications from
4 DEA to that defendant as to anything the defendant was
12:54:35 5 doing.

6 Number 14 is granted. I'm going to exclude any
7 evidence or argument that plaintiffs' claims or verdicts
8 would interfere and/or negatively impact the pharmaceutical
9 industry and/or the government's regulation of the
12:54:54 10 pharmaceutical industry.

11 Number 15, reference to the DEA approving or endorsing
12 a particular defendant's suspicious order monitoring
13 program. Again, this goes to what I said, so this is denied
14 without prejudice. If the defendants have documents from
12:55:16 15 the DEA relevant to one of their programs, they can
16 introduce it.

17 16 is denied. That goes along with what I said, this
18 is a suggestion or argument that DEA's failure to sanction
19 or initiate enforcement. Both sides are free to bring in
12:55:48 20 evidence about what DEA did or didn't do with their
21 enforcement actions or their investigations and ask the jury
22 to draw conclusions therefrom. That's fair game for both
23 sides. So that was really 16 and 17 go together in that
24 regard.

12:56:12 25 All right. 18 is granted, any reference to any award

1 of damages might adversely affect the ability of any member
2 of the jury or the public to purchase or have available
3 medication. We're obviously not going to have any testimony
4 or speculation on that.

12:56:44 5 19 is granted for the same reason. We're not going to
6 have any testimony or speculation that a judgment might have
7 an adverse affect on any defendant's ability to compete in
8 the marketplace.

9 The same with 20. We're not going to have any
10 testimony about that any verdict might adversely impact any
11 defendant's incentive or ability to develop new drugs.

12 21 is also granted for the same reason.

13 22 is denied without prejudice. I can't address this
14 in the abstract. If someone is trying to use deposition
15 testimony from a deposition where the other side didn't have
16 a -- wasn't present or didn't have a fair opportunity to be
17 there, I'll have to address it in advance of that witness.
18 So we'll have to take it up on a case-by-case basis,
19 witness-by-witness basis.

12:57:53 20 23, relative to learned intermediary, is granted in
21 part. The defendants may not argue or suggest they
22 satisfied the duty to warn because of the mere existence of
23 the learned intermediary doctrine. But of course defendants
24 may argue that their warnings to doctors were accurate and
12:58:15 25 that whatever happened is the doctor's responsibility after

1 that. That's part of their defense. They can defend
2 against these claims using that if they wish.

3 Number 24 is denied. This relates to alleged failure
4 to mitigate. If the defendants want to make that argument
12:58:36 5 or evidence, they can do so.

6 25 is, obviously, going to be granted. We're not
7 going to have the personal identification data of any
8 children or any children in child protective custody.

9 And 26 is granted, too. We're not going to have
12:58:57 10 testimony or evidence about individually-identifiable health
11 information or medical records of any individual person. If
12 someone somehow feels it's become relevant then to -- notice
13 the Court in advance, and I'll address that.

14 Number 27, reference of identity of any undercover law
12:59:24 15 enforcement personnel. I agree with plaintiffs, that
16 everyone has got to take reasonable steps to protect the
17 identity of undercover law enforcement personnel, but I'll
18 need to know that in advance, because a lot of these people
19 have testified in other proceedings, and if they have, well,
12:59:46 20 there's no more confidentiality.

21 The same with number 28, about reference to
22 individuals in the Cuyahoga County Jail. I'm not sure how
23 it's relevant, but we'll take that up on a specific basis.

24 29, obviously there's not going to be any evidence
13:00:14 25 about allegations of any county corruption, but if there's

1 actual evidence of it and it's bearing on this case, well,
2 then, that may be relevant.

3 All right. Number 30, I think, both sides agree that
4 the fact of the grand jury proceeding is inadmissible. So
13:00:44 5 there won't be any reference to a grand jury investigation,
6 but if there are underlying facts that led to an
7 investigation, that's fair game for either side.

8 31 is granted as unopposed.

9 32 is granted as unopposed.

13:01:08 10 33, again, is granted. We're not going to refer to
11 general investigations of people. That's not relevant. If
12 it led to an indictment and the charge is somehow relevant,
13 then so be it.

14 34 represented about podcasts or media coverage
13:01:30 15 regarding Cuyahoga County courts, that's -- I don't
16 understand exactly what plaintiffs are trying to preclude or
17 what the defendants are trying to admit, so that's denied
18 without prejudice.

19 35, reference to any investigation regarding the death
13:01:51 20 of Aniya Day Garrett. I'm not going to issue a blanket
21 exclusion of this. I'm not sure how it's going to be
22 relevant. So before someone introduces that, they're going
23 to have to make a showing that it's relevant.

24 36, again, relates to corruption in Summit County.
13:02:17 25 The same thing, there's going to be no testimony about

1 allegations. If there's evidence, actual evidence of
2 corruption, it may be relevant.

3 37, deaths of an individual while in the Summit County
4 Jail. That's denied without prejudice. Again, I fail to
13:02:38 5 see how it would be relevant.

6 All right. Turning to Cardinal's motions *in limine*.

7 Number 1, evidence concerning 14,000 suspicious orders
8 which Cardinal did not report and did not ship, that's
9 denied.

13:02:54 10 Number 2 is denied, evidence and argument containing
11 an interest in gossip e-mail.

12 Number 3, evidence based on data produced by Cardinal
13 for the years 1996 through 2005 are denied, but all sides
14 are to be careful so we're not comparing apples with oranges
13:03:19 15 and drawing conclusions therefrom. So if you have 20 years
16 of data, you can't say it leads to the same inference as 10
17 years, or the numbers are equivalent.

18 Turning to Track One defendants' omnibus motions *in*
19 *limine*. Number 1, evidence or argument concerning future
13:03:42 20 damages, that's granted, because plaintiffs can't seek
21 future damages.

22 Number 2 is denied without prejudice. Plaintiffs can
23 introduce individualized evidence of description and
24 shipments, but only if it was produced by the plaintiffs
13:04:08 25 during discovery.

1 Number 3, I can't rule on these in the abstract, so
2 it's denied without prejudice.

3 Number 4, lay and hearsay testimony about prescription
4 opioids being a gateway. It's denied as to factual
13:04:46 5 testimony, testimony about facts is allowed. I'm not going
6 to allow fact witnesses to give expert testimony, however.

7 Number 5, evidence concerning lobbying, that's denied
8 without prejudice. It may be relevant. Obviously, everyone
9 is free to lobby state, local, federal officials. And
13:05:14 10 there's nothing wrong about that, but it may be relevant to
11 go to intent, or it may be relevant -- again, there's a wide
12 open strike zone about what the federal government did or
13 didn't do, and it may be relevant as to why the federal
14 government did or didn't do something.

13:05:31 15 Number 6 I'm denying. Shipments to areas of the
16 country outside of Summit and Cuyahoga County may be
17 relevant.

18 I'm denying number 7.

19 I'm denying number 8. We've already addressed number
20 eight with Daubert rulings. I don't need to do it again.

21 Number 9, denying.

22 And 10, people can use charts and data.

23 Number 11, I'm granting in part and denying in part.
24 Evidence as to defendants' overall financial conditions,
13:06:19 25 sales, revenues, are not relevant. Defendants' evidence as

1 to revenues and profitability directly relating to opioid
2 sales may be relevant.

3 Number 12 is denied without prejudice. I think it's
4 too broad, but, again, I don't think -- we're not going to
13:06:47 5 have individual witnesses being asked about their personal
6 feelings about the opioid crisis or who is responsible. That
7 would be improper questioning.

8 Number 13 was resolved by the parties, so that's moot.

9 14, I'm granting it. Some of the defendants will have
13:07:12 10 corporate representatives at counsel table, some won't.
11 Some may have them some days, some may have them not other
12 days. We're not going to have any comment. It's not
13 relevant whether a corporate representative is here every
14 day or some of the days, so we're granting that.

13:07:31 15 All right. McKesson's motions *in limine*.

16 All right. Number 1 is denied without prejudice.
17 It's too broad. I'll deal with it as it comes up.

18 Number 2 is denied. Evidence relating to the U.S.
19 House Energy and Commerce Committee investigation, that may
13:07:55 20 be relevant.

21 Number 3, nationwide trends in drug deaths may be
22 relevant.

23 Number 4, evidence or argument about allegations
24 contained in letters from the DEA or DOJ. They may be
13:08:15 25 admissible, so I'm denying that.

1 Number 5, I'm denying that, but additional rulings may
2 be made via objections to deposition designations.

3 Number 6, testimony, documents, relating to McKesson's
4 relationship with CVS and Rite Aid. That's denied, it may
13:08:49 5 be relevant.

6 Turning to distributors' omnibus motions *in limine*.

7 Number 1 is denied. Settlements with the DEA in West
8 Virginia may be relevant.

9 Number 2, nonparty corporate representatives
13:09:06 10 testifying to matters outside their personal knowledge, I'm
11 denying that without prejudice. But, obviously, a witness
12 may only testify to evidence within his or her personal
13 knowledge. If the witness is a corporate representative and
14 the witness knows from his or her experience what their own
13:09:31 15 company's practice is, they can testify to that, but they
16 can't speculate as to practices they don't know about or
17 something in some other department, or from a period of time
18 they don't know about.

19 I think everyone knows that.

20 All right. Evidence of criminal indictments and
21 investigations without corresponding proof of final judgment
22 or conviction. It's granted as to indictments that did not
23 lead to a conviction.

24 It's denied as to general criminal investigations,
13:10:05 25 unless the source of the information or other circumstances

1 lack trustworthiness.

2 Number 4, prohibit plaintiffs from stating expressly
3 or suggesting that the jury may infer that an older document
4 never existed just because it cannot be found.

13:10:35 5 I'm denying this. This is -- this is for the jury.

6 If either sides wants to ask the jury to draw conclusions
7 from the fact that a document can't be found, they can make
8 the argument. The jury can draw whatever conclusion it
9 wishes.

13:10:51 10 Number 5, evidence or arguments suggesting
11 distributors committed a fraud on the DEA. Well, we don't
12 have a fraud on the DEA claim here, so plaintiffs can't
13 argue that there's a fraud on the DEA. But it's open game,
14 open season on what DEA did or didn't do, or what the
15 parties produced to DEA.

16 Number 6 ties in with something I said before,
17 references broadly and generally to defendants. So I'm
18 going to caution the plaintiffs that when -- if they mean
19 argument or a question or -- question to apply to all
20 defendants, fine; but if not, they're not just to lump them
21 all in, they're to be specific.

22 Number 7, evidence and arguments about RICO predicates
23 that plaintiffs did not identify in their discovery
24 responses, that's denied.

13:12:07 25 Number 8 is denied.

1 All right. Turning to Teva and Actavis motions *in*
2 *limine.*

3 Number one, reference to the Cephalon misdemeanor
4 plea, that's denied.

13:12:26 5 Reference to off-label promotion is denied. Reference
6 to the civil settlement between Cephalon and the Office of
7 Inspector General along with the settlement of the opioid
8 action brought by the Oklahoma attorney general, that's
9 denied.

13:12:42 10 Evidence of any harm that may have occurred outside of
11 these two counties is denied.

12 Evidence of market relating shipments outside of these
13 two counties is denied.

14 Evidence regarding Teva's financial support of
15 third-party groups is denied, it may be relevant.

16 Testimony from Russell Portenoy is denied, but it's
17 probably moot because I'm not sure he's going to be
18 appearing.

19 Number eight, argument that the Actavis generic
20 defendants should have made additional warnings regarding
21 their generic medicines or should have stopped selling them
22 is granted in part and denied in part.

23 Under the Supreme Court established law, a defendant
24 doesn't have to stop selling. Defendants don't have to stop
13:13:39 25 selling, so no one can argue that they should have or were

1 required to. But any evidence that any defendant engaged in
2 false marketing, that's an essential part of the plaintiffs'
3 claim. That can come in.

4 All right. I'm going to grant 9 and 10. The purchase
13:14:22 5 price paid by Teva for Actavis I think is more prejudicial
6 than probative, so it's out. And any reference to the
7 settlement agreement between Teva and Allergan, that's
8 granted, unopposed.

9 All right. I think that takes care of all the motions
13:14:44 10 *in limine*.

11 All right. Obviously, I've given each side 100 hours
12 so we get this trial to the jury well before Christmas.
13 Cardinal has raised a concern that it should get some
14 additional time because so many of the Cardinal witnesses
13:15:12 15 are going to be testifying live because it's within
16 100 miles of the Northern District of Ohio.

17 And the Court has some sympathy for Cardinal's
18 argument. Obviously, you know, witnesses that are appearing
19 by deposition, their testimony is limited. It's going to be
13:15:34 20 limited to certain excerpts, and there won't be any live
21 cross-examination.

22 I'm not -- I mean, the 100 hours is for the defendants
23 to use as they please. I'm not saying that each defendant
24 has to have, you know, 16 and a half hours or whatever. So
13:15:53 25 I think that the testimony that -- that the hours should be

1 used fairly, and obviously there needs to be and likely need
2 to be more cross-examination of witnesses that are appearing
3 live.

4 But I'm not going to -- I'm going to suggest that
13:16:10 5 that's something for the defendants to work out among
6 themselves. I'm not going to give Cardinal more hours or
7 direct that the defendants allocate more to Cardinal, but
8 I'm suggesting that everyone needs to be fair about that.

9 I think Special Master Cohen has dealt with how he
13:16:31 10 wants the parties to deal with these deposition excerpt
11 objections, to get them to him on a rolling basis. Everyone
12 knows when the witnesses will appear, and he will deal with
13 that.

14 All right. There were objections to witnesses. There
13:16:52 15 were two or three that came in very late, and may be I can
16 deal with them. If I can deal with them quickly now, I
17 will.

18 All right. The first one, this is a third-party
19 witness. David Gustin filed a motion to quash the
13:17:14 20 plaintiffs' subpoena that he appear and testify.

21 All right. Mr. Gustin is a former employee of
22 McKesson. He retired in 2016. He was director of
23 regulatory affairs for the central region in early 2014. He
24 gave a seven-hour videotape deposition in August of 2018,
13:17:42 25 500-page deposition.

1 On March 21st of this year, Mr. Gustin was indicted in
2 the Eastern District of Kentucky, a federal indictment on a
3 felony charge alleging conspiracy with unnamed
4 coconspirators to distribute and dispense a quantity of
13:18:02 5 pills containing controlled substances between 2008 and
6 2016.

7 Mr. Gustin has represented through counsel that he
8 will exercise his Fifth Amendment right if he testifies.

9 Now, I always took the position when I was a
13:18:24 10 prosecutor that it was improper and prejudicial just to
11 bring a witness in to a trial or jury to take the Fifth when
12 everyone knew he was going to take the Fifth.

13 Can the plaintiffs articulate why it would be more
14 probative than prejudicial to bring in Mr. Gustin just to
13:18:47 15 take the Fifth? He's a former employee of McKesson. You
16 have his deposition. You can seek to use his deposition.
17 He's clearly an unavailable witness. He certainly has a
18 Fifth Amendment right, and if anyone would challenge it, I
19 most likely would overrule that challenge.

13:19:09 20 Can you articulate to me why it won't be unfairly
21 prejudicial to him and to McKesson to bring him in and take
22 the Fifth?

23 MR. WEINBERGER: Your Honor, Peter Weinberger
24 on behalf of plaintiffs. He doesn't have a right to
13:19:25 25 exercise his Fifth Amendment rights when he is not a

1 defendant in the civil action. And so I understand your
2 analysis, Your Honor, but he can be compelled to testify,
3 and it is our preference that he respond to the subpoena,
4 and that we not have to play a seven-hour deposition.

13:19:46 5 THE COURT: Well, I'm not sure -- you
6 think -- whatever testimony he's given, he's given. All
7 right? Anyone can use that. All right?

8 But now he has a present Fifth Amendment right because
9 he's facing criminal indictment, and he's going to be asked
13:20:05 10 questions about the conduct during the time period when he
11 worked for McKesson during the indictment. You can
12 challenge that, but I'm the one who would have to rule on
13 the challenge, and I think you'd have a very, very uphill
14 battle.

13:20:19 15 If you want to go through that, you can. And if I,
16 you know -- but if I -- if you want to challenge his
17 assertion of the Fifth Amendment privilege, we're going to
18 do that one night. We're not going to take up trial time,
19 and -- but I think you're going to lose. He's got a Fifth
13:20:39 20 Amendment right. If you're going to be asking him about
21 anything he did during the time frame of that indictment,
22 and I'm sure you are -- you're not going to be worried about
23 what he did in 2003 or something -- I'm going to sustain his
24 privilege.

13:20:56 25 I think we're going to leave it -- unless you can

1 articulate in writing why he does not have a Fifth Amendment
2 privilege to answer questions about conduct that forms the
3 basis of the indictment, I'm going to quash it. But I'll
4 wait for your response.

13:21:19 5 MR. SHKOLNIK: Judge Polster, Hunter Shkolnik.

6 Just if I can add to that. In situations like this,
7 one option is that there's a stipulation that if the witness
8 was called and asked about any of these facts, he would
9 exercise his right under the Fifth Amendment, and it's a
13:21:34 10 stipulation that we can rely upon and utilize as part of our
11 evidence in chief. We're entitled to it.

12 THE COURT: But the only evidence then would
13 be some prejudice that a former employee of McKesson is
14 saying the Fifth. That's the whole point.

13:21:49 15 MR. SHKOLNIK: But the fact --

16 THE COURT: You think -- I mean, I don't think
17 you can use against McKesson in this trial the fact that a
18 retired employee whose now been indicted is exercising his
19 Fifth Amendment right, the same way I don't think you can
13:22:08 20 introduce against McKesson the fact that this guy has been
21 indicted and say, well, that somehow shows that McKesson did
22 something wrong.

23 MR. SHKOLNIK: Well, the indictment goes
24 directly to his job title and the distribution, which serves
13:22:21 25 as the basis of the claims.

1 THE COURT: I understand. An indictment is
2 only an allegation. That's the same reason I ruled on these
3 motions *in limine*. You can't just introduce evidence of
4 indictments that didn't lead to convictions. That's unfair.

13:22:38 5 So unless the plaintiffs can convince me in writing,
6 clearly, that Mr. Gustin doesn't have a valid Fifth
7 Amendment right, I'm going to grant the motion to quash.

8 All right. Then we've got Cardinal Health's motion to
9 quash the trial subpoena of Jennifer Norris, who is
13:23:00 10 Cardinal's in-house counsel.

11 All right. I haven't read her deposition, all right?
12 I don't know what the plaintiffs are going to ask her.
13 Clearly, she can be subpoenaed to testify to anything within
14 her personal knowledge that's not privileged, and personal
13:23:25 15 knowledge could include her knowledge of Cardinal's general
16 practice and procedures. All right. That's her personal
17 knowledge. Anything beyond that would be speculation.

18 So I don't know -- you know, I think everyone knows
19 that. So I'm not going to quash the subpoena, because she
13:23:45 20 may have relevant testimony in this case which the
21 plaintiffs, if they want to have her live, can ask.

22 But if they ask her to guess or speculate, the
23 objection is going to be sustained.

24 MS. MAINIGI: Enu Mainigi for Cardinal. If I
13:24:02 25 may address that.

1 Miss Norris was not a percipient witness with anything
2 having to do with anti-diversion. She did serve as the
3 corporate representative, and in that capacity, she learned
4 information for the purpose of providing 30(b) (6) testimony.
13:24:24 5 She has now been issued a trial subpoena to appear live
6 personally.

7 So she does not have personal knowledge, Your Honor,
8 she served as the 30(b) (6).

9 THE COURT: Well, Ms. Mainigi, I don't have
10 any reason to doubt what you're saying. I don't know what
11 the plaintiffs are going to ask her. They can subpoena
12 anyone they want. They know they can't ask someone to guess
13 or speculate. They're pretty experienced lawyers. They
14 know I'm not going to allow a witness to guess or speculate
15 or repeat hearsay, what someone told him or her, so I'm
16 assuming they're calling her to ask permissible questions,
17 the same way I'm assuming your witnesses, when you call
18 them, you intend to ask them admissible questions.

19 So I'm denying the motion to quash the subpoena on the
20 assumption that the plaintiffs understand the Rules of
21 Evidence.

22 MR. WEINBERGER: Your Honor, Peter Weinberger
23 again. I just want to note for the record, we did file a
24 written response with respect to the Gustin issue.

13:25:35 25 THE COURT: I guess I didn't see it. Anyway,

1 I'm denying the motion to quash. Obviously, you can only
2 ask -- well, you filed something on Gustin?

3 MR. WEINBERGER: Yes.

4 THE COURT: Well, can you articulate why you
13:25:50 5 don't think he has a Fifth Amendment privilege?

6 MR. WEINBERGER: Well, he may have a Fifth
7 Amendment privilege, but not one that he can assert in this
8 action. That's our point, Your Honor.

9 THE COURT: Well, that wouldn't be much of a
13:26:08 10 Fifth Amendment privilege, Mr. Weinberger.

11 MR. WEINBERGER: It has to do with whether or
12 not he has been civilly sued in this case, which he has not.
13 And I think --

14 THE COURT: But that has nothing to do -- his
13:26:23 15 Fifth Amendment privilege, he just needs a well-founded
16 belief that answers to these questions could, you know,
17 could hurt him, you know, could be used against him in a
18 criminal investigation, and he's under indictment. It's not
19 a guess or a speculation. He's under indictment, and you're
13:26:46 20 going to be asking him questions about that same period.

21 All right. I'm going to grant that motion.

22 MS. SINGER: Linda Singer for the plaintiffs.
23 Just to speak to the arguments that were made in the motion,
24 if I may, Your Honor, without speaking to whether he has a
13:27:01 25 right to invoke a Fifth Amendment privilege, I think

1 plaintiffs have argued with case law support in its motion,
2 which I do not have in front of me, unfortunately, that a
3 witness taking a Fifth Amendment privilege which applies in
4 a criminal proceeding, the plaintiffs are still entitled to
13:27:19 5 claim an adverse inference in the civil litigation.

6 Mr. Gustin's responsibilities go directly to
7 McKesson's enforcement responsibilities that are at issue in
8 this case. And the fact that he cannot get up and testify
9 as to what he did or didn't do, as Your Honor has said, in
13:27:39 10 that capacity at McKesson goes directly to plaintiffs'
11 claims, and the jury is entitled to make an inference.

12 THE COURT: All right. I think it is far more
13 prejudicial than probative, particularly since you have a
14 500-page deposition. You have the testimony, and you can
13:27:56 15 put into evidence anything he testified to about what he did
16 or didn't do, assuming it's within his personal knowledge,
17 about all those things. You've got his answers.

18 So I'm granting that motion, that motion to quash is
19 granted.

13:28:30 20 All right. I've already told the parties -- I'm going
21 to reiterate, we're not going to be hopefully cluttering up
22 this trial about objections to the admissibility of
23 documents on grounds of authenticity. And if we do, and the
24 objection is denied, I'm going to charge all that time to
13:28:49 25 the party that objected. So both sides are aware of that.

1 There was a motion that was filed this week by some or
2 all of defendants asking me to order lawyers and witnesses
3 not to discuss this case outside of the courtroom.

4 I mean, we already have it for lawyers. Specifically,
13:29:51 5 it was to preclude attorneys and witnesses from discussing
6 this case outside of the courtroom.

7 Certainly, my -- does anyone think there's a reason
8 for the Court not to issue this order? I'm concerned -- I
9 mean, I'm not sequestering this jury. There's already been
13:30:19 10 a tremendous amount of publicity about this, all right. The
11 jury is going to hear from the lawyers what the lawyers need
12 to tell them with opening statements, closing arguments.
13 They'll hear the questions. They'll hear from the witnesses
14 what the witnesses need to tell them from their testimony.

13:30:38 15 Certainly, lawyers shouldn't be talking to the press
16 about the case, and I don't think witnesses should be
17 either. I don't think I've ever gagged witnesses, though,
18 and then there's a question of should it apply to parties.

19 And the problem is, the plaintiffs are public
13:30:59 20 officials, and so what does everyone think about this?

21 MR. SHKOLNIK: Your Honor, on behalf of
22 Cuyahoga County, I think I feel comfortable. We just spoke
23 with counsel. We don't have intentions of making statements
24 regarding the trial, the case, but certainly, as government
13:31:26 25 officials and the government, if issues related to opioids

1 do come up, to curtail the government or its representatives
2 or its officials from talking about it, I think that's too
3 far --

4 THE COURT: Mr. Shkolnik, no way am I going to
13:31:42 5 try and curtail a public official's right to, you know, to
6 deal with the opioid crisis or talk about it.

7 I think the defendants' motion had to do with, like,
8 commenting on the trial or adding to their testimony, or
9 saying, you know, "I thought it was" you know what. If they
13:32:05 10 want to criticize me, that's fine. I don't care. But
11 something having to do with directly commenting on what
12 happened in the courtroom, that's what I'm talking about.

13 MR. SHKOLNIK: And I understood that,
14 Your Honor.

13:32:18 15 The county has no problem with not commenting upon the
16 trial and what is happening here.

17 THE COURT: All right.

18 MR. SHKOLNIK: I just wanted to make that --

19 THE COURT: All right. I think I'm going to
13:32:30 20 issue that order. I don't want there to be any comment,
21 discussion by attorneys, parties, and witnesses, about
22 what's happened in the courtroom.

23 All right. Everyone has worked extremely hard and
24 done, I think, a terrific job in getting this case ready for
13:33:04 25 trial.

1 The one aspect where I'm disappointed is the fact that
2 we are about to begin this trial, and we don't have any
3 semblance of final jury instructions. The parties only
4 agreed on my boilerplate, which I didn't ask agreement about
13:33:26 5 that. We sent that out so you wouldn't have to worry about
6 that.

7 The submissions would lead one to conclude that this
8 is the first civil RICO trial in this country. It obviously
9 isn't, or the first public nuisance trial in any court in
13:33:43 10 Ohio, which it's not.

11 And, you know, as a result, I didn't need those jury
12 instructions for myself at the beginning. You all needed
13 them. When I was a trial lawyer, I wanted to know what the
14 law was before the case started, not after the evidence
13:33:58 15 submissions were in, and I'm encouraging the parties who are
16 here to urge their lawyers to work constructively.

17 The idea is not to gain these instructions or get
18 every last ounce of argument in them. A jury instruction is
19 to be conservative. By conservative, I mean it's what the
13:34:19 20 law is, not what the law might be or should be. The law in
21 this district, this circuit, this country, what it is on
22 these issues.

23 You want an instruction that's going to be affirmed
24 one way or the another; in other words, it's accurate. It's
13:34:34 25 not argument, it's accurate. And you want it as clear as

1 possible to laypersons, which means as little legalese as
2 possible. Some is inevitable, it's legal instructions.
3 That's what it should be.

4 And I know that if both sides, all sides work
13:34:52 5 constructively, they can produce instructions that are
6 90 percent agreed upon. Yes, there may be a couple critical
7 legal issues I'm going to have to rule on, okay, but I've
8 never started a trial where there was nothing agreed on.

9 So as it now stands, you know, I'm going to be working
13:35:11 10 on it. And if it takes two months it will take two months,
11 and it won't be good for either side. But I'm making it
12 clear now on the record that both sides, all parties,
13 plaintiffs and the defendants, have waived any objection
14 they have to not getting timely jury instructions, because
13:35:28 15 it's of your own doing, their own doing.

16 You know, one of the key issues is joint and several
17 liability. I'm going to have to decide that. I believe
18 that the law imposes joint and several liability, but I'll
19 certainly have to carefully look at that. But, again, I
13:35:49 20 will work on that. If we've got to do it all ourselves from
21 scratch, which is the way it is now, it's going to take a
22 long time.

23 So, again, I would encourage some lawyers who aren't
24 going to be in this courtroom daily doing the witnesses to
13:36:06 25 work together, and to the extent you can submit anything

1 that you agree upon, the odds are 99.9 percent that I'm
2 going to give it, so I would encourage that.

3 I am working on preliminary jury instructions right
4 now, and I've got to tell the parties something -- the
13:36:28 5 jurors something about what they're going to be doing, what
6 the claims are, and what they're going to have to consider.

7 And I'm going to have it to do it somewhat generally,
8 and I will get that out to the parties this week so you can
9 look at them. And if you think there's anything, you know,

13:36:48 10 that's just flat out wrong, let me know. I don't want to
11 create an error, but, again, it's preliminary instructions.

12 So I'll get those out as soon as I can in a short turnaround
13 time.

14 All right. We have some stipulations. I guess I need
13:37:05 15 to know from all of you what you want me to do with them.

16 In some trials, the parties have wanted the judge to
17 read them all at the beginning or all at the end, or at
18 certain points; or sometimes the lawyers read them, you
19 know, in conjunction with a particular witness. I really
13:37:24 20 don't care, I just want to know.

21 And I generally include those in the final
22 instructions, just so the jury is reminded of it, but you
23 all have to figure out, you know, how you want to -- what
24 you want to do with those.

13:37:39 25 And I'll take my cue from you.

1 LAW CLERK: Right now we've got them in the
2 preliminary instructions.

3 THE COURT: Well, I don't know. I mean, one
4 idea I thought of would be to actually give each juror a
13:38:00 5 copy of them that they can keep and have. I mean, if I read
6 off 20 stipulations, guess what? After number one or two,
7 they're going to glaze over and not know what it counts for.

8 A stipulation only makes sense in the context of some
9 testimony or documents. So what do you all think about
13:38:21 10 giving each juror a printed copy of them?

11 I give each juror a copy of the final jury
12 instructions at the end. I don't give them the preliminary
13 instructions, but they're going to take back into their
14 room -- and I do that because, believe it or not, I had a
13:38:38 15 case where I was trying the case, and the judge gave one
16 copy, and the foreperson monopolized it and didn't show it
17 to anyone else.

18 It's hard to fathom, but it did happen to me. So when
19 I became a judge, every juror is going to get his or her own
13:38:58 20 copy. But what do you think about getting the copies.

21 MR. LANIER: Your Honor, Mark Lanier for the
22 plaintiffs. Currently we have scheduled a meeting with
23 Special Master Cohen at 1:00 p.m. on Sunday to deal with
24 exhibit issues.

13:39:11 25 THE COURT: Okay.

1 MR. LANIER: If the Court would indulge us,
2 we'll communicate with defense counsel between now and then,
3 and if we can't come up with an agreement deal with it with
4 the special master on Sunday.

13:39:23 5 THE COURT: Okay. If I just start off the
6 trial by reading 20 stipulations, Mr. Lanier, it's really a
7 waste.

8 MR. LANIER: Agreed.

9 THE COURT: At the end it may be useful with
13:39:34 10 the -- you know, after the summary and everything, but, so,
11 I'll take my cue from you.

12 MR. LANIER: Thank you, Judge.

13 All right. I'm reminding everyone that in terms of
14 our schedule, it looks like next Monday we'll be completely
13:39:55 15 opening statements. I don't think there will be time for
16 any witnesses. But we'll start with the testimony on
17 Tuesday.

18 There is no trial next Friday, October 25th. There's
19 no trial Monday, November the 11th, that being Veterans Day.
13:40:11 20 It's a federal holiday. And Thanksgiving week, the last
21 week of November, we're in trial only Monday and Tuesday,
22 the 25th and 26th.

23 So I'm going to tell all of the jurors that, so they
24 know.

13:40:33 25 I think I've got everything on my list. But now, is

1 there anything that -- and let me say, with the jury, what
2 I'm going to do is, we're bringing in 50 tomorrow, and I've
3 got some questions for the whole panel which I will ask.
4 That's my customary practice.

13:40:59 5 Then I will let each side take a short period of time
6 to ask any additional questions, or maybe the same ones if
7 you want to ask it in a different way. That's fine.

8 And then if there are questions often from
9 the -- maybe from the questionnaire that we want to question
13:41:25 10 individual jurors, since there are so many, just having
11 everyone congregate at the sidebar isn't very efficient, and
12 so I would bring the jurors into my chambers with just one
13 representative from each party, for no more than five
14 minutes of questioning.

13:41:41 15 And then we'll have for cause challenges, which I'll
16 deal with on the record, to any of the 50. And if after
17 those for cause challenges we have at least 24 jurors, I
18 will then have the parties do their peremptory challenges.
19 We have up to six for the plaintiffs, up to six for the
13:42:11 20 defendants. I want to end up with 12, so we need 24, and
21 we'll do it.

22 If we don't have 24, let's say we have only 20, what
23 we'll do is I'll direct those 20 to come back Thursday, and
24 we'll start up the process with the next 50. And, you know,
13:42:36 25 when it's clear we'll have -- you know, then we'll have some

1 for cause challenges, and then I guess we'll have to do the
2 peremptories with the 20 left from day one and however is
3 left with day two, is what we'll do. That's the way we'll
4 do it.

13:42:56 5 And I believe based on the very good and excellent
6 work we did last week, it won't take more than two days to
7 pick the jury. We may be able to do it just in one.

8 But the process has worked very well and everyone
9 worked very hard, and I want to appreciate that cooperation,
13:43:15 10 and we excused a lot of jurors who clearly should have been
11 excused.

12 Okay. Anything that any counsel for any of the
13 parties wish to raise?

14 MR. WEINBERGER: Yes, Your Honor. On behalf
13:43:31 15 of plaintiffs, Peter Weinberger.

16 On the voir dire issue, so maybe this is -- maybe I'm
17 wrongly assuming, but I'm assuming that we're going to be
18 able to voir dire the entire panel.

19 THE COURT: Correct. I'm going to be asking
13:43:44 20 my questions of, Mr. Weinberger, of the 50, and you can
21 address your questions to the whole 50, or you can say,
22 juror number 33, what do you think of this; either way.
23 And, yes, and challenges for cause will be to the whole 50
24 that we're having Wednesday, right.

13:44:05 25 MR. WEINBERGER: And when we exercise

1 peremptories, is it going to be with respect to the first 12
2 in the box?

3 THE COURT: You can exercise your peremptory
4 on anyone. I mean, you only have six. If you want to use
13:44:18 5 your six on jurors 45 through 50, you can.

6 And the way I do it, just say we had 12 in the box,
7 and someone strikes number 6, well, then, I bring up the
8 first -- the next numbered juror, and he or she takes the
9 spot of number 6. And we're going to end up with 12.

13:44:47 10 And the way I work it, whoever is left -- hopefully
11 all 12 are here at the end of the trial, and if so, we have
12 12 deliberate. If someone has gotten sick or had a family
13 emergency we have only 11, and then we have only 11. But
14 any one of the 12 stays on.

13:45:05 15 MR. WEINBERGER: So tomorrow we'll know sort
16 of the seating chart, you know, where is the next juror up
17 sitting at?

18 THE COURT: Yes, Mr. Weinberger, you'll know,
19 and you probably won't know until right then. They'll come
13:45:19 20 in, and they'll have a name and number, and we'll know. I
21 mean, we'll all have the questionnaires, so we'll know then.

22 The jury department will be doing that randomly.
23 You'll know tonight which are the 50, and then they'll come
24 in, and then we'll have to sort our questionnaires so we
13:45:35 25 know who is seated where.

1 MR. WEINBERGER: And in terms of time for each
2 side for voir dire questioning, Your Honor?

3 THE COURT: Well, what do you think is
4 reasonable? I normally don't allow a lot: 15, 20 minutes is
13:45:56 5 what I'm thinking. Because, again, these jurors have been
6 asked a lot of questions, a lot of very good probing
7 questions, and we have their answers.

8 And obviously, if a juror has expressed on his or her
9 questionnaire some hesitation, some uncertainty in the
13:46:16 10 question, do you believe you can be fair and impartial, I'm
11 not going to question this juror out in this room. That's
12 what I'm going to ask that juror back in my chambers.

13 So I'm thinking maybe 20 minutes for the plaintiffs,
14 20 minutes for the defendants on, you know, other questions,
13:46:35 15 or repeating my questions.

16 MR. LANIER: Mark Lanier for plaintiffs.

17 If I understand your process right, you don't want us
18 to get answers in the global voir dire that would
19 commit -- that would be sufficient for cause. If we look
13:46:58 20 like we've got someone who may have a for cause reason --

21 THE COURT: Right.

22 MR. LANIER: -- then we take them back
23 individually, and not try to mess up the whole panel.

24 THE COURT: That's the whole point, correct,
13:47:11 25 Mr. Lanier, of doing it back there.

1 Obviously, I don't want some juror to blurt out why he
2 or she might have a problem, and everyone is going to --

3 MR. LANIER: Hear it.

4 THE COURT: One of two things will happen. It
13:47:24 5 may taint everyone, or someone may think, hah, that's how
6 I'll get off this jury. See what number 33 said? That's
7 me, too.

8 MR. LANIER: In light of that, if that's the
9 approach, then the 20 minutes should be valid for us to get
13:47:38 10 the questions we need to get out to elicit to know who to
11 take back to chambers.

12 THE COURT: That's the idea. Or, you know,
13 introduce yourself, or there's some general things you want
14 to throw out there, that's what it for.

13:47:53 15 MS. MAINIGI: Your Honor, may I ask a
16 follow-up? Enu Mainigi for Cardinal.

17 As I understood it, each one of the 50 will be taken
18 back for individual voir dire; is that correct?

19 THE COURT: I think so; or maybe to save time,
20 if no one has a reason to do it, then I won't. I mean, I've
21 been going back and forth as to whether we just bring
22 everyone back just to bring everyone back, or if there's
23 absolutely nothing on the questionnaire that creates any
24 issue, I don't know. I mean, do you have a strong opinion
13:48:38 25 either way?

1 MS. MAINIGI: I do, Your Honor, on behalf of
2 Cardinal. We had understood that each individual juror
3 would be invited back, and it may be that one juror, we're
4 going to be done with them in 30 seconds because no one has
13:48:51 5 any questions; but we do think we need that opportunity to
6 ask those questions, especially if we're getting 20 minutes
7 on the front end.

8 THE COURT: I may do it -- I may do it, if not
9 for that reason, I don't want any of the jurors to feel like
13:49:08 10 there was something wrong with them and they, you know, or
11 other jurors wondering, well, why did the Judge talk to him
12 and not me, or her or not me.

13 So I think probably out of fairness, I think it makes
14 sense to bring everyone back even if it turns out it's
13:49:26 15 really quick and nothing to ask.

16 I think it looks better, so we'll follow your
17 suggestion.

18 MS. MAINIGI: Thank you.

19 MR. NICHOLAS: Your Honor, Bob Nicholas from
13:49:35 20 AmerisourceBergen. I have a follow-up question on that --

21 THE COURT: Okay.

22 MR. NICHOLAS: -- which is when jurors are
23 taken back individually, are we going to be making our
24 strike motions -- our cause motions back -- you know, one by
13:49:48 25 one, or are you bringing them all back and then we do it at

1 the end?

2 THE COURT: Well, I think what's efficient,
3 Mr. Nicholas, is that after we finish asking the juror the
4 questions, the juror goes back, and then I think I might
13:50:11 5 say, does anyone feel this juror should be excused for
6 cause. And I'll take it up right then, right there, when
7 we're fresh on it, rather than waiting what could be an hour
8 or something, and then going back to Juror Number 23. I
9 think that's more efficient, and I think that's what we'll
13:50:30 10 do, and I'll rule on it. And if no one has a challenge for
11 cause, then that's quick. And if someone does, well, then,
12 I'll rule on it.

13 I think that makes sense, because what that juror has
14 said and how he or she has said it will be fresh in
13:50:47 15 everyone's mind, and it's the way to do it.

16 MR. NICHOLAS: I would agree.

17 MR. WEINBERGER: Your Honor, a couple of more
18 things on the plaintiffs' side.

19 As I understood your earlier ruling, you were allowing
13:51:05 20 each of the defendants to have a lawyer back and
21 interviewing an individual juror, and you were allowing us
22 one lawyer per plaintiff?

23 THE COURT: Right.

24 MR. WEINBERGER: Can we have three lawyers on
13:51:20 25 our side? There's going to be six lawyers --

1 THE COURT: All right. You can have three.

2 It's all right, two or three. I didn't want to overwhelm
3 the -- I don't want the juror to feel uncomfortable.

4 Okay. All right. Any --

13:51:41 5 MR. WEINBERGER: Yes, Your Honor. Sorry,
6 I'm --

7 THE COURT: No. I understand, Mr. Weinberger,
8 these aren't all your questions. You might have received
9 some from colleagues. You're a spokesperson.

13:51:52 10 (Overlapping speakers.)

11 MR. WEINBERGER: I spent all night --

12 UNIDENTIFIED SPEAKER: *Mea culpa.*

13 THE COURT: That's all right.

14 MR. WEINBERGER: We've been discussing with
15 Special Master Cohen the issue of the length of the opening
16 statements, and we've made a couple of proposals.

17 Have you made a ruling on that, Your Honor?

18 THE COURT: I thought we did.

19 LAW CLERK: We did.

13:52:21 20 THE COURT: Yeah, I thought we did. I even
21 brought it out with me.

22 SPECIAL MASTER COHEN: Judge, there were three
23 versions that were floating through the e-mail, and all of
24 the parties agreed on what was called Version 3.

13:52:35 25 THE COURT: Well, I'll just put it on. It's

1 my understanding that everyone agreed on two and a quarter
2 hours total for plaintiffs, and 30 minutes for each
3 defendant family, so that would be 6 times 30 is 3 hours
4 total.

13:52:49 5 Now, that's a long opening statement for plaintiffs,
6 and I know, Mr. Lanier, you have a very fine reputation, but
7 I don't know too many people who can keep anyone's attention
8 for two and a quarter hours. I've seen people who have
9 tried, and they didn't do too well.

13:53:15 10 So if you don't want to use all two and a quarter
11 hours, that's fine with me, and you may be helping your
12 clients. But the parties agreed on it, so I'm not going to
13 pull the trapdoor on you.

14 MR. LANIER: Thank you, Judge.

13:53:34 15 MR. WEINBERGER: Your Honor, we submitted an
16 e-mail to you with respect to the issue of live video
17 streaming of the proceedings to a remote location, and we
18 learned after that that the defendants have objection to
19 that because of security issues.

20 13:53:54 And not to go through all of the details --

21 THE COURT: On that, Mr. Weinberger -- I don't
22 want to cut you off. I'm not certain that the Court has
23 ever permitted like live streaming of a trial outside of the
24 courtroom. We're live streaming inside the courtroom to the
13:54:19 25 overflow rooms, two of them, and I hope people can hear and

1 see.

2 I mean, is it working okay in those other courtrooms?

3 DEPUTY CLERK: There wasn't anyone there.

4 THE COURT: Oh, there wasn't anyone there. I
13:54:33 5 thought of it late. All right. I thought of it late.

6 But I don't think we've ever had actual live streaming
7 to a location outside of the courtroom. Is that right?
8 Courthouse. We've never done it, and I'm not sure it's even
9 permissible.

10 MR. WEINBERGER: So what our hope is, and it
11 has to do with room in the courthouse and, you know, both
12 sides have large teams.

13 THE COURT: Right.

14 MR. WEINBERGER: And we would want to live
13:55:13 15 stream it just to one location outside of the courthouse.
16 And I don't have the details now, but I have been assured by
17 my tech person, who has been in contact with Court Connect
18 on this, that it can be done in a way that assures both
19 sides that it's secure, and so there won't be a problem with
20 security. It will help, and it has to do, frankly, Your
21 Honor, with the whole logistics and the large teams that we
22 have.

23 So let me address another issue that relates to that.

24 THE COURT: Well, let's stick with -- I mean,
13:55:55 25 the defendants had -- I mean, are you proposing while the

1 defendants don't want to do it, you just want to do it for
2 your side?

3 MR. WEINBERGER: Right. Right.

4 And, again, I can -- look. You ordered us to, earlier
13:56:11 5 on in this case, not to release ARCOS data. And despite the
6 fact that it was shared with large numbers of people on our
7 side, it never got leaked out.

8 You know, I think that's a demonstration that you can
9 trust the lawyers on our side to, with the security of this
13:56:32 10 video feed, and it's just going to one location, Your Honor.

11 THE COURT: Well, look. It's just come up.
12 To say I'm not a technological expert would be a gross
13 understatement.

14 I can understand, we've got lots of lawyers. Everyone
13:56:52 15 can't fit in the courtroom. I mean, even being in -- you
16 know, coming in the overflow room, as a principal matter, if
17 there's a secure way for only lawyers to see it, I don't
18 have any problem with it. I don't know if it can be done
19 securely. At least if it's done, both sides should have it.

20 MS. MAINIGI: Your Honor, Enu Mainigi for
21 Cardinal Health.

22 As Your Honor is aware, we do object to the live
23 streaming outside the courtroom. We do think that there's
24 too much room for abuse. We're not suggesting at all that
13:57:31 25 plaintiffs would do that.

1 THE COURT: Well, how could it be abused?

2 MS. MAINIGI: Well, we are worried that it
3 could be taped. We're worried you can take your phone and
4 tape it. As I understand it, in the courtroom, people are
13:57:43 5 not going to be allowed to videotape what's on stream.

6 THE COURT: Right. No one can walk in with
7 their cell phone and turn it on.

8 MS. MAINIGI: But that cannot be prevented if
9 you're live streaming to the Ritz, for example. You
13:57:57 10 can't --

11 THE COURT: Well, that's a good point.

12 MS. MAINIGI: You can't monitor people walking
13 in and out of the war room that are not lawyers. People,
14 witnesses who have been sequestered, perhaps, Your Honor --
13:58:11 15 and I know we haven't necessarily gotten to that -- those
16 witnesses could inadvertently be wandering through.

17 We think there's way too much room for abuse here, so
18 I think it is for good reason that this Court has never
19 allowed live streaming outside the courtroom.

13:58:29 20 THE COURT: Well, to be fair, Ms. Mainigi, no
21 one has ever asked me to do it. I haven't refused to, it
22 never came up, so I never had to deal with it.

23 MR. WEINBERGER: So let me tell you, so we
24 have an office in the Old Post Office building so we're not
13:58:47 25 talking about the Ritz, Your Honor. And we can represent to

1 the Court that where we would video stream it into that
2 office would be a segregated room with no phones and no
3 recording equipment. And if we need to hire a deputy to
4 assure the defense that we're following whatever order comes
13:59:09 5 out of the Court, we're happy to do that.

6 THE COURT: So, you know, I mean --

7 MS. MAINIGI: Your Honor, it seems like a
8 whole lot of work and effort. I don't understand why all
9 the lawyers here --

13:59:21 10 THE COURT: Well, I mean, it --

11 MS. MAINIGI: -- cannot come to the courtroom
12 in the overflow courtroom. That's what everybody is
13 planning to do. That is what Your Honor indicated we needed
14 to do.

14:00:02 15 THE COURT: Well, since I've never done this,
16 I'm concerned. And particularly since the defendants are
17 objecting, I'm concerned about the security.

18 SPECIAL MASTER COHEN: Just so everybody is
19 clear, there are two --

14:00:19 20 THE COURT: And apparently, I've been reminded
21 that live streaming was discouraged at a Judges' meeting. I
22 must have not been paying attention at that meeting, or
23 maybe I was absent; but I'm concerned about it.

24 SPECIAL MASTER COHEN: Judge, there are two
14:00:42 25 overflow courtrooms, and the wells in both of those

1 courtrooms are available for counsel.

2 THE COURT: Right. Counsel can sit there.

3 SPECIAL MASTER COHEN: The entire well.

4 THE COURT: You can sit there and work, do
14:00:53 5 whatever you want. The only thing you can't do is record.

6 DEPUTY CLERK: First come, first seated.

7 THE COURT: Right. But the point is, I mean,
8 you can -- that's what they are there for. That's why I
9 provided for two overflow courtrooms, to make sure, you
14:01:11 10 know, anyone will be able to sit. And there's a lot of
11 room. You see all the seats there. Those wells are empty.
12 So all those seats will be available. The jury box is
13 available. There should be plenty of room.

14 So I think we're not going to have the live streaming.

14:01:30 15 MR. WEINBERGER: All right. One follow-up
16 issue, Your Honor.

17 The directive that we heard is that, particularly in
18 here, we can't have our lawyers using laptops when they're
19 sitting behind the rail. And so people at the trial table
14:01:50 20 here are going to be communicating with people who have
21 laptops and smartphones to get exhibits, to plan for the
22 next day, et cetera, et cetera.

23 THE COURT: Right.

24 MR. WEINBERGER: So we would ask the Court's
14:02:05 25 indulgence to allow the lawyers working with us, who are

lucky enough to get seated behind the jury rail in this courtroom, to be able to use laptops and smartphones. Obviously, turning off any sound or any -- it will also facilitate that people won't be walking back and forth between --

6 THE COURT: Right.

7 MR. WEINBERGER: -- the space behind the jury
8 rail and the trial tables.

18 I trust all of you to not be secretly recording. I
19 mean, quite frankly, someone could have some device in their
14:03:11 20 briefcase or whatever, and no one would know.

21 LAW CLERK: We're not reserving seats.

22 THE COURT: I know. We're not reserving
23 seats, but I will allow lawyers working on this case.

24 I'll allow lawyers to do it in this courtroom so long
14:03:34 25 as they're not being obtrusive. There can't be typing

1 noise, tapping that's disruptive.

2 MR. STOFFELMAYR: Your Honor, can I just ask
3 that that ruling include at least one paralegal per party?
4 We were especially concerned about the exhibits.

14:03:50 5 LAW CLERK: Now we're talking about reserving
6 sheets.

7 THE COURT: No, we're not reserving any seats.
8 I will allow a paralegal to have a laptop to communicate
9 with the lawyers.

14:04:00 10 MR. STOFFELMAYR: Thank you.

11 THE COURT: But, again, you got to do it in a
12 way not to allow any sound. I'll allow that, we'll just do
13 it.

14 MR. WEINBERGER: And finally, Your Honor,
14:04:21 15 realizing that you have portable microphones, we are
16 wondering how strict you are in terms of having to stay at
17 the podium when we're giving opening, when we're inquiring
18 of a witness, et cetera.

19 THE COURT: All right. I'm not strict. The
20 only thing, I have two rules, Mr. Weinberger: One, you have
21 to be audible for our court reporter, wherever you are; and
22 number two, I don't let anyone, like, crowd into the jurors'
23 space. I've seen lawyers who have done that, and I've
24 required them to step back.

14:05:00 25 But if you, you know, so you've got to be -- those are

1 my only two rules. So if you want to --

2 DEPUTY CLERK: The batteries on the portable
3 microphones are not the greatest, and they don't last two
4 and a quarter hours. So --

14:05:23 5 THE COURT: That may be the way to limit you,
6 Mr. Lanier.

7 DEPUTY CLERK: So the only question would be,
8 if you're done, please put the one that you've used back on
9 the track, take another one, so they're constantly charging.

14:05:39 10 THE COURT: I wouldn't do that, intentionally
11 give you a short-life battery, Mr. Lanier.

12 But the point is, make sure that the court reporter
13 can hear you clearly and you're not crowding the jurors.
14 But I don't mind, some lawyers like to be at counsel table,
14:05:58 15 some at the podium, some like to walk around. It's okay.

16 MR. STOFFELMAYR: Your Honor, we had one
17 additional question. It's Kaspar Stoffelmayr, back in the
18 corner here.

19 We were just curious if the Court intended to issue a
14:06:21 20 Rule 16 order to exclude witnesses. And if so, our request
21 is that it would not include expert witnesses, so that
22 expert witnesses can be in court to watch testimony, but
23 fact witnesses could not.

24 THE COURT: No one has raised it, so I don't
14:06:37 25 generally in a civil case exclude witnesses, but if there's

1 a particular reason to do so someone should raise it with
2 me.

3 Mr. Stoffelmayr, no one has raised that, and I
4 generally don't issue it in a civil case as a --

14:06:58 5 MR. STOFFELMAYR: All right. Why don't we
6 discuss it --

7 THE COURT: Why don't you discuss it and see
8 what you want to do.

9 MR. STOFFELMAYR: Great. Thank you.

14:07:21 10 THE COURT: Okay. Special Master Cohen
11 advised me that -- well, I figured it would be around now.

12 The jury department has identified the 50 who we're
13 calling in now, so we can share that with counsel.

14 DEPUTY CLERK: I would just like to ask all of
14:07:39 15 you, if you do have any staff that manages to get a seat in
16 the Front Row, can you please have them bring some kind of
17 identification for the Court security officers so they know
18 that those people are allowed to use the laptops.

19 THE COURT: That's a good idea.

14:07:59 20 DEPUTY CLERK: Thank you.

THE COURT: Okay. Thank you very much.

22 We're adjourned.

23 DEPUTY CLERK: All rise.

24 —————

25 (Proceedings adjourned at 2:08 p.m.)

1 **C E R T I F I C A T E**

2

3 I certify that the foregoing is a correct transcript
4 from the record of proceedings in the above-entitled matter.

5

6 */s/ Donnalee Cotone* *15th of October, 2019*
7 DONNALEE COTONE, RMR, CRR, CRC DATE
Realtime Systems Administrator

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